DW 06-001

PETITION OF PETER ST. JAMES et al.

Petition to Assert Jurisdiction of the Public Utilities Commission Over the Warner Village Water District

Order Granting Petition

O R D E R N O. 24,649

July 18, 2006

APPEARANCES: Eugene F. Sullivan III, Esq. for Peter St. James, Rhonda St. James, Debra Buckley and Kenneth Benward; Brackett L. Scheffey, Esq. for Water Village Water District; Suzanne Amidon, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

The New Hampshire Public Utilities Commission (Commission) opened this docket upon the jointly filed petition of Peter and Rhonda St. James, Debra Buckley and Kenneth Benward (Petitioners), all of Warner. They comprise three of the four residential customers who have been placed on notice by the Warner Village Water District (District) that the District intends to discontinue the provision of water service to them at some point in the summer of 2006. The Petitioners, all of whom reside outside the boundaries of the District, seek an order of the Commission that temporarily restrains the District from disconnecting them and that takes "appropriate actions" to ensure that the Petitioners "are adequately protected to ensure that they continue to receive safe and adequate service for the long term." The Petitioners made their filing on January 4, 2006.

On January 19, 2006, the Commission's executive director sent a letter to the District requesting that the District respond to the petition by February 3, 2006. The District sought additional time to file a response, was allowed an extension until February 20, 2006, and submitted its response on February 21, 2006. Included in the pleading was a motion to dismiss

the petition on the ground that the Commission lacks jurisdiction over the dispute. No objection was made to this submission for late filing.

The Petitioners filed an opposition to the dismissal motion on March 15, 2006. The Commission issued an order of notice on April 6, 2006, scheduling a prehearing conference for April 25, 2006, and establishing April 21, 2006, as the deadline for submitting intervention petitions. No requests for intervention were filed. Pursuant to RSA 363:17, the Commission designated Hearings Examiner Donald M. Kreis to conduct the prehearing conference, report the facts and make recommendations to the Commission. The prehearing conference took place as scheduled, after which the parties and Staff conducted a technical session. Staff filed a report of the technical session on April 26, 2006, and Mr. Kreis submitted his report and recommendations on May 1, 2006. In summary, Mr. Kreis noted that the parties agreed that the issue of jurisdiction was a legal question and recommended that the Commission order a briefing schedule.

Consistent with the hearings examiner's recommendations, the Commission issued Order No. 24,625 (May 18, 2006) directing that the parties submit a stipulation of facts on April 28, 2006, and briefs on the question of the Commission's jurisdiction by May 23, 2006. In addition, the Commission directed the District to refrain from terminating service to the Petitioners or any household similarly situated pending further order of the Commission..

On April 28, 2006, Petitioners requested additional time to file the stipulation of facts, and the District filed the stipulation of facts on behalf of the parties on May 3, 2006. The Petitioners and the District filed legal briefs regarding the Commission's jurisdiction on May 23, 2006. Staff did not file a brief.

The stipulation of facts states, in pertinent part, as follows:

1. The District is a body corporate and politic governed established as a village district pursuant to RSA 32:1.

2. Petitioners reside outside of the boundaries of the District.

3. Silver Lake was the original source of water for the District, and the pipe through which Petitioners receive service is the pipe that traverses from Silver Lake to Warner.

4. Silver Lake is no longer the supply source. The water that once flowed from the lake to the actual village district now flows in the other direction to the four affected properties.

5. The District's Bylaws and Terms and Conditions of Service contemplate the provision of service outside the District's geographical boundaries.

6. There is no record of approval of a service area or franchise are granted to the District from the Commission for the service provided outside its geographical boundaries as required under RSA 362:2 and 362:4.

7. The District informed Petitioners, by letter dated October 11, 2005, that the District would terminate service to their properties, and that Petitioners would need to drill wells.

8. All customers of the District contribute to operations costs and debt service on bonded indebtedness, including capital expenditures.

II. POSITIONS OF THE PARTIES

A. Petitioners

Petitioners state that the Commission's jurisdiction is set forth generally in RSA 362. Petitioners noted that the term "public utility" does not include municipal corporations operating within their corporate limits but this exception does not apply to the District because Petitioners'

households are outside the District's boundaries. RSA 362:2, I.

Petitioners further argue that the provisions of RSA 362:2 as they apply to municipal water service are further set forth in RSA 362:4, which provides that the District would be entitled to exemption from Commission regulation under RSA 362:2 if the District serves customers outside the District boundaries and serves such customers "a quantity and quality of water or a level of water service equal to that service to customers within the municipality." RSA 362:4, III-a (a) (1). Petitioners claim that the District is not providing the same quantity or quality of water outside its boundaries as it provides within its boundaries, asserting that while improvements have been made to the District's water system, none have been made for the improvement of service to Petitioners.

The Petitioners characterize the District's decision not to make improvements in service to the affected households as a failure to maintain the same quantity and quality of service as that provided to customers within the municipality, contrary to the requirements of RSA 362:4,III-a (a) (1). Petitioners argue that they are the type of ratepayer "the Legislature sought to protect in RSA 362:4, III-a (a) (1), [a] ratepayer without the right to vote on issues affecting their service, [a] ratepayer whose only protection is the Commission." Petitioners' Brief at 3.

B. Warner Water District

The District acknowledges that it serves households outside its corporate limits and concedes that it is a utility, but argues that it is not a public utility subject to Commission jurisdiction. The District relies on the Supreme Court's determination in *Appeal of Zimmerman*, 141 NH 505 (1997), concerning the provision of telecommunications services by a landlord to his tenants, that "unless a person has publicly professed his readiness to perform a particular

service he is under no duty to render that service to all who request it." The District contends that because it has not publicly professed its readiness to supply water to others, nor offered service to the public at large, it does not qualify as a public utility.

The District also argues that the Supreme Court in *Zimmerman* indicated that "if there is a separate relationship between the utility and the customer, it is necessarily a private enterprise (and thus not a public one). As such, it would not be under PUC jurisdiction." District's brief at 5. The District asserts that the "separate relationship" that exists between the provision of water service and the Petitioners is the proximity of the Petitioners to the pipe line. The District concludes on this basis that the Petitioners are not members of the general public.

The District argues as well that the fact that the District served the affected households in the past does not mean it undertook a permanent obligation. The District claims that it is not engaged in the business of providing water to people outside its boundaries and that while it may be desirable for Petitioners to continue receiving service, the Petitioners are not and never were the intended customers of the District.

The District also contends that it is exempt from regulation as a public utility by virtue of RSA362:4, III-a (a) which reads as follows:

> A municipal corporation furnishing water services shall not be considered a public utility under this title:
>
> (1) If it serves new customers outside its municipal boundaries, charges such customers a rate no higher than 15 percent above that charged to its municipal customers, including current per-household debt service costs for water system improvements, within the municipality, and serves those customers a quantity and quality of water or a level of water service equal to that served to customers within the municipality. Nothing in this paragraph shall exempt a municipal corporation from the franchise application requirements of RSA 374.

Finally, the District states that it does not serve "new" customers outside its boundaries

and does not intend to do so. The District states that it charges its "old" customers outside the District boundary the same rates for water, and that the water service is the same quality and quantity as that provided "to the rest of the District." District Brief at 7. As to the requirement contained in RSA 362:4, III-a (a), which requires a municipal water company to apply for a franchise to serve outside its boundaries, the District states that "it is nonsensical for the District to apply at this late date for a franchise to do something it does not want to do and for the purpose of being able to stop doing it." *Id*. The District concludes by arguing that it is not required to apply for a franchise under RSA 374:22 because it is not "commencing business" nor is it doing anything "in which 'it shall not already be engaged.'" District Brief at 9.

III. COMMISSION ANALYSIS

At the outset, we note that there is agreement between Petitioners and the District that the District is a village district within the meaning of RSA 52:1 and, therefore, is a body corporate and politic with all powers "in relation to the objects for which it is established that towns have or may have in relation to like objects." RSA 52:2. It follows that the District is a municipality within the meaning of RSA 38:1, III and a municipal water company within the meaning of RSA 38:1, IV.[1] The question remaining is whether the District is a public utility subject to the Commission's jurisdiction.

According to RSA 362:2, a municipal corporation is not a public utility if it operates within its corporate limits. The Petitioners and the District have stipulated that the District's

[1] We have previously recognized that a village district is a municipal corporation. For an example, *See North Conway Water Precinct*, 89 NH PUC 496, 498 (2004).

bylaws allow the District to provide water service to customers outside its boundaries, and that the District in fact provides water service to Petitioners.[2] These facts are undisputed.

Pursuant to RSA 362:4, III-a (a)(1), a municipal corporation furnishing water outside its municipal boundaries, shall not be considered a public utility if:

> (1) If it serves new customers outside its municipal boundaries, charging such customers a rate no higher than 15 percent above that charged to its municipal customers, including current per-household debt service costs for water system improvements, within the municipality, and serves those customers a quantity and quality of water or a level of water service equal to that served to customers within the municipality. *Nothing in this paragraph shall exempt a municipal corporation from the franchise application requirements of RSA 374.*" (Emphasis added.)

It is also undisputed that the District has not sought a franchise from the Commission to provide water service outside its service territory.

Nonetheless, the District contends that its provision of services to property owners outside the District's boundaries is not dispositive. It argues instead that the controlling factor is that the Petitioners are "serendipitously" located near the water line previously used to serve the

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[2] Article IV of the bylaws states:

> Residents outside the boundaries of the District, (Precinct) may be provided services because of special conditions but only under contracts approved by the Commission." We have not been provided any evidence that service contracts exist, but note that Item 2 of the Warner Village Water District Terms and Conditions states ". . . the rendering of service by the District and its use by the customer shall be deemed a contract between the parties, subject to all terms and conditions of the District's Regulations.

entire District from Silver Lake and that this "discrete characteristic" of Petitioners' homes—the proximity to the water main—constitutes a separate, and private, relationship to the District.

To support its argument, the District relies on an expansive interpretation of the holding in the New Hampshire Supreme Court's 1997 *Zimmerman* decision. In that case, a commercial landlord who owned and managed several buildings offered telephone services to his commercial and retail tenants. The Commission determined that the landlord was operating a public utility and ordered him to show cause why he should not be subject to sanctions for doing so without Commission authorization. On appeal, the Supreme Court noted that one characteristic of a public utility is to offer service without discrimination. The Court observed that the landlord only offered telephone services to tenants with whom he had a landlord-tenant relationship.[3] The Court observed that members of the public would have to be tenants of the landlord to qualify for the telephone service he offered. The Court concluded that "[b]ecause Zimmerman does not share this affinity [landlord-tenant relationship] with other members of the relevant public, he cannot be said to offer telecommunications services to all comers without discrimination. His [telephone] network, therefore, is not a public utility within the commission's jurisdiction under RSA 362:2." *Zimmerman*, 141 NH at 612.

In our view, the District draws too broad an inference from the Court's reliance on the landlord-tenant relationship as the dispositive factor in *Zimmerman*. The Petitioners' proximity to the pipe emanating from Silver Lake may be a geographic and historical happenstance that limits the universe of households that the District might be inclined to serve, but the same can be said of every public utility in New Hampshire, since none has a service territory that

[3] *Claremont Gas Light Co. V. Monadnock Mill*, 92 NH 468 (1943), relied upon by the District, also involved

encompasses the entire state. Therefore, we do not agree that geographic proximity, and any historical happenstance that caused the entity in question to serve some physical places and not others, creates a business relationship that is "sufficiently discrete as to differentiate [Petitioners in their capacity as customers of the District] from other members of the relevant public." *Id.*. Indeed, to conclude otherwise in the context of RSA 362:4 would mean that municipalities could build pipelines outside their boundaries and declare that they are not subject to Commission regulation because they only intend to serve customers in proximity to those pipelines.

Furthermore, the District operates according to a set of bylaws that contemplates water service to households outside the District without distinction.[4] This in itself tends to undermine the District's position that its conduct is, like that of the landlord in *Zimmerman*, not "[s]ervice to the public without discrimination." *Id*. at 609 (citations and internal quotation marks omitted). In these circumstances, service to customers outside the district without a franchise by the Commission to do so violates the requirements of RSA 362:4, III-a (a)(1).

The District further contends that, because it no longer intends to serve members of the public outside its boundaries, and, if it successfully disconnects Petitioners from service, it will not serve outside its boundaries, it will not be a public utility and, therefore, does not need the

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service offered by a provider to service recipients in a lessor-lessee relationship with the provider.

[4] Further, we note that the Terms and Conditions of the District indicate that the District would disconnect for nonpayment (Item 13) but does not state any other condition under which it would be acceptable for the District to terminate service. The District cannot now argue that, because it does not intend to continue service Petitioners, it can now terminate them without any consequence. This action would also appear to be in conflict with its own Bylaws, and Terms and Conditions which only permits disconnection for nonpayment of bills.

Commission's franchise. Essentially, the District is relying on historic non-compliance with RSA 362 to escape the Commission's jurisdiction. The District also contends that it is not operating illegally because it has not added "new" customers, but proposes to discontinue service to "old" customers. *See* RSA 362:4, III-a (a)(1). Both of these arguments are illogical when considered in the context of the statute.

We recognize that there are arguably some internal inconsistencies in the language of the statute. We also acknowledge that the Supreme Court is the final arbiter of the intent of the legislature as expressed in the words of a statute. *Carter v. Lachance*, 146 NH 11, 13 (2001). Using the guidance enunciated by the Supreme Court, however, we conclude that the District's interpretation of the statute is inconsistent with standards of statutory construction used by the Court.

As noted above, RSA 362:4, III-a (a)(1) provides that a municipal corporation is not a public utility when it serves customers outside its boundaries at a rate no higher than 15 percent billed to the rest of its customers, and with a quantity and quality of water equal to that provided to the rest of the customers. RSA 362:4, III-a (a)(1) further states that no municipal corporation is exempt from obtaining a franchise pursuant to RSA 374:22. The Petitioners contend in their brief that the legislative purpose is to protect customers outside of a municipal corporation from high rates, and to assure the quantity and quality of water service provided to such customers.

In examining the meaning of the statute, the Court first looks at the words in the statute and applies the plain meaning of the words used. *Id.* If we follow the District's interpretation that a franchise is only required of a municipal corporation seeking to provide service to "new" customers, the consumer protection purposes of the statute would be frustrated because the out-

of-franchise customers of a municipal corporation would have the protections afforded by the statute in situations where municipalities observed the franchise requirements of RSA 374 but not in situations where municipalities failed to observe the franchise requirements of RSA 374. In such circumstances, it is appropriate to examine the statute's overall objective and presume the legislature would not pass an act that would lead to such an illogical result. *Estate of Gordon-Couture v. Brown*, 152 NH 265, 266 (2005).

The District contends that, although it proposes to completely discontinue service to the Petitioners, it has provided the same quantity and quality of water to households outside the District as it has within the District and therefore qualifies as an exempt municipal corporation pursuant to RSA 362.4, III-a(a) (1). The District ignores the obvious reality that its proposed action—terminating service to Petitioners—is the most drastic expression possible of inequity in service in violation of the statutory requirement.

Regardless of how the District arrived at the current state of affairs, it has shown no basis for us to conclude that it has not been or is not subject to the requirement of RSA 362:4, III-a(a) (1) that it obtain a franchise from the Commission pursuant to RSA 374:22. RSA 374:22 states in pertinent part: "No person or business entity shall commence business as a public utility within this state, or *shall engage in such business*. . . without first having obtained the *permission and approval* of the commission." (Emphasis added.) The Commission typically grants a franchise by issuing an order[5] that, among other things, delineates the area of the franchise. The granting of a franchise brings with it certain rights and obligations. In the case of a municipality operating

[5] An example of such an order can be found at 86 NH PUC 746 (2001) and, more recently, 89 NH PUC 496 (2004).

outside its boundaries, the breadth of regulation is constrained under certain conditions, but unambiguously leaves such a municipality subject to the franchise application requirements of RSA 374, which in turn lays out the general regulatory authority of the Commission (as distinct, e.g., from its oversight of rates and charges pursuant to RSA 378). If the effect of the reference to RSA 374 in RSA 362:4, III-a(a)(1) were limited to requiring the District to make a filing with the Commission (a franchise application) when deemed a convenient exercise by the District, the requirement would amount to nothing beyond a rote exercise. In other words, notwithstanding the exemption of the District from the definition of "public utility" for other purposes, our responsibility to give substance to the franchise application requirement is among those to be reasonably inferred from the franchise application requirement. *See State v. New England Tel. & Tel. Co*., 103 N.H. 394, 397 (1961) (noting that Commission's authority extends from express enactments to the "fairly implied inferences" drawn from such exactments) (citations omitted). Thus, RSA 362:4, III-a (a)(1) does not provide nearly the free rein to a municipality that the District posits.

The District appears to be arguing that, because it has not sought a franchise pursuant to RSA 362.4, III-a (a)(1), it need not seek the Commission's permission under RSA 374:28 to discontinue service to the Petitioners. It is reasonable to read RSA 362:4, III-a (a)1 as expressing the Legislature's intent to preclude economic and financial regulation of municipalities under certain circumstances. The statute, however, is clear in retaining Commission regulation over franchising, which pertains to both market entry and market exit. The granting of a franchise confers on an entity the right to provide service and along with the right to serve goes the obligation or duty to serve customers within the franchise or service territory. Concomitant with

an entity's duty to serve is the restriction on its ability to discontinue service or exit the market. *See, e.g., State v. Frost*, 91 N.H. 229, 232 (1941) (referring to public utility's "obligation to serve"). In any event, the fact remains that although the District did not seek the Commission's permission and approval, pursuant to RSA 374:22, to serve customers outside its boundaries, it is nonetheless subject to the Commission's jurisdiction and it may not discontinue service to the Petitioners without Commission authorization to do so.

Based on the preceding analysis, we find that the District has operated and is operating as a municipal corporation providing services outside its boundaries without a franchise in violation of RSA 362.4, III-a (a) (1) and that it is subject to the Commission's jurisdiction. There may be some merit in the District's argument that applying for a franchise, or requiring it to apply for a franchise, at this time would be illogical since it only intends to seek discontinuance of service to the Petitioners. Nevertheless, in an attempt to clarify the situation, we grant the District permission to provide service outside its boundaries to the households currently taking service from the Silver Lake pipeline. We also note that the Commission has previously ordered the District to refrain from discontinuing service to Petitioners and that requirement remains in force. Finally, we point out that in the event the District seeks to discontinue service outside its boundaries it is required to file a petition explaining how such discontinuance would be for the public good.

Based upon the foregoing, it is hereby

ORDERED, that the Commission has jurisdiction over the Warner Village District and the District shall not discontinue water service to the Petitioners without Commission authorization.

By order of the Public Utilities Commission of New Hampshire this eighteenth day of July, 2006.

Thomas B. Getz	Graham J. Morrison	Clifton C. Below
Chairman	Commissioner	Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary